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In the Supreme Court of the United States

OCTOBER TERM, 1983

J. H. RUTTER REX MANUFACTURING CO., INC.

Petitioner

VERSUS

UNITED STATES OF AMERICA, HAROLD BROWN SECRETARY OF DEFENSE, LT. GENERAL GERALD J. POST, DIRECTOR, DEFENSE LOGISTICS AGENCY, GENERAL EMMETT BOWERS, COMMANDER, DEFENSE PERSONNEL SUPPORT CENTER, AND FRANK L. COCCIA, DIRECTOR, CLOTHING AND TEXTILES DIRECTORATE, DEFENSE PERSONNEL SUPPORT CENTER,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether one having a long-standing relationship with the Government as a supplier of its procurement requirements has a constitutionally protected property right to equal opportunity of access to government procurement contracts.

PARTIES

The parties to this proceeding are those named in the caption of the case or the successors in office to the individually named defendants. Not named in the caption is the intervenor-defendant, DeRossi & Son Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

J. H. Rutter Rex Manufacturing Co., Inc., petitions for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit entered on June 9, 1983 (Appendix A), and judgment entered on July 5, 1983 (Appendix B).

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (Appendix A, *infra*) is reported 702 F.2d 706 (5th Cir. 1983). The opinion of the district court (Appendix B, *infra*) is reported 534 F.Supp. 331 (E.D. La. 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1983. (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Constitutional provision involved is Amendment V. The statutory provisions and regulations involved are 10 U.S.C. §§2301 and 2305(a); 15 U.S.C. §§631(a) and 644(a); 32 C.F.R. §1, Part 7. These are set forth in relevant part in Appendix D.

STATEMENT OF THE CASE

At issue is the validity of Department of Defense (DOD) regulations governing the set-aside of military procurement contracts for bidding by small business concerns. The regulations are codified at 32 C.F.R. Sec. 1, Part 7 known as the Defense Acquisitions Regulations (DAR), formerly known as Armed Services Procurement Regulations (ASPR).

Rutter Rex contended below that the regulations governing set-asides are invalid and that their further implementation should be enjoined. The bases of the

complaint are that the regulations are unconstitutional and in excess of statutory authority.

At stake here, if Rutter Rex is successful, is merely the opportunity to submit competitive bids for a proportion of government apparel contracts. Also at stake is the public's interest in maintaining a fair and reasonable national procurement policy in compliance with law. This action *is not* an attack on the small business programs of the United States or the assertion of a claim of entitlement to a particular procurement contract. This action seeks no more than a constitutional balancing of interests in order to achieve a fair result in the government's procurement program.

Rutter Rex is an apparel manufacturer in New Orleans, Louisiana. In its combined operations, Rutter Rex employs in excess of 500 persons and therefore is not a "small business" under the relevant standard. 13 C.F.R. § 121.3-8 and § 121-Schedule A. For over 40 years Rutter Rex manufactured apparel procured by DOD. For over 20 years, its New Orleans plant was operated almost exclusively for such production. Its government business steadily decreased since 1976 when Rutter Rex bid on and obtained five procurement contracts with a value in excess of $14.7 million. By 1981, Rutter Rex was unable to secure a single contract.

Defendants represent the basic chain of command for procurement of garments for DOD. Annually they procure from private sector manufacturers billions of dollars of property for the military, including apparel.

In 1947, Congress passed the Armed Services Procurement Act which provides, "It is the policy of Congress

that a fair proportion of the purchases and contracts under this Chapter be placed with small business concerns." 10 U.S.C. §2301. The "fair proportion" requirement extends to all government procurements under the Federal Property and Administrative Services Act of 1949 (41 U.S.C. §251 et seq.) and the Small Business Acts of 1953 and 1958 (15 U.S.C. §631 et seq.). Congress has also mandated that "full and free competition" be preserved in DOD and other government procurements. (10 U.S.C. § 2305(a); 15 U.S.C. §631(a)).

In 1958, the DOD adopted regulations (ASPR) to implement these policies. These regulations provided, *inter alia*, that certain procurements would be set aside for the exclusive participation of small business concerns (32 C.F.R. 1-706.1(b)), if the contracting officer determines:

> "...that there is a reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices." 32 C.F.R. §1-706.5(a)(1) (1958).

This section was changed effective July 27, 1979 (Appendix D, *infra*) to provide that bids need only be reasonably expected from "at least two responsible small business concerns" (32 C.F.R. §1-705.(a)(1)-1979). This created the fiction that as few as two bidders for any procurement satisfied the "full and free competition" requirement.

More importantly, a new provision, 32 C.F.R. §1-706.1(f), was added. It states that once a product has been acquired successfully on the basis of a small business set-aside, "*...all future requirements of that office for that*

particular product...shall be acquired on the basis of a repetitive set-aside." [emphasis added]

These significant changes in the regulations have resulted in the total, automatic exclusion of Rutter Rex from access to the procurement contracts on which it traditionally bid.[1]

The district judge found,

> "I have no serious doubt that plaintiff's loss of government business was caused at least by the government's small business program." (App. B at p. A-31)

Defendants conceded the correctness of this finding during oral argument before the appellate court.

Cross motions for Summary Judgment were filed (intervenor having filed a Motion to Dismiss) supported by discovery and affidavits. The material facts were not in dispute. After extensive briefing and argument, the district judge issued an opinion on February 22, 1982 granting the Government's Motion for Summary Judgment. Judgment dismissing the suit was entered on February 22, 1982.

The district court's holdings were:

1) Rutter Rex has standing to maintain this suit.

2) There is no constitutionally protected property

[1] It was argued below that certain bidding opportunities were afforded Rutter Rex even after July 27, 1979. This begs the question. The challenged regulations mandate 100 percent set-asides whenever possible and the possibility for same exists in the garment industry which is dominated by small businesses. (App. A at fn. 20 and App. B at p. A-38)

interest in the right or opportunity to seek to do business with the government.

3) The Court should not interfere with DOD's "complete discretion" in implementing broadly stated procurement policies and, therefore, the regulations should be upheld.

4) The goal practices under attack are not reviewable.[2]

The Fifth Circuit, in an opinion by Judge Tuttle (sitting by designation from the Eleventh Circuit), affirmed. The court ruled that there is no constitutional right of access to government contracts and:

> "Since no fundamental rights are implicated, we need only determine whether the contested socio-economic legislation rationally relates to a legitimate governmental purpose." (App. A at p. A-23)

Relying upon the broad discretion afforded agencies in the implementation of statutes, the judicial deference due such agencies, the broadness of the "fair proportion" concept which Congress has never undertaken to define, and given the Congressional intent to place a greater number of procurement contracts generally with small businesses, the court ruled that the Congress intended "fair proportion" to be a floor, that is, small businesses were intended to receive *at least* a fair proportion of government procurement contracts and that, accordingly, the subject regulations:

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[2] Pursuant to 15 U.S.C. §644(g)(h) and 32 C.F.R. §1-705.6(e), and for many years prior to the passage of these provisions, defendants established "goals" for participation by small business concerns in procurement contracts. These goals were challenged as arbitrary quotas. Although constituting relevant background, discussion of the goals is not required for resolution of the issue raised by this Petition.

"...are rationally related to the sound legislative purpose of promoting small businesses...." (App. A at p. A-23)

Although Rutter Rex disagrees with the appellate court's opinion on the latter point, it is the constitutional issue which is asserted to merit consideration by this Court. This issue overshadows all others, particularly the political issues mentioned during the numerous Congressional hearings prominently cited below (App. A at fn. 12).

The nature of the right of access to government procurement contracts is a basic and important question of federal law which has not been, but should be, answered by this Court.

ARGUMENT

THERE IS A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO AN EQUAL OPPORTUNITY OF ACCESS TO GOVERNMENT CONTRACTS

The threshold inquiry is whether the right to bid on government procurement contracts falls within the zone of interests afforded constitutional protection. This Court repeatedly has held that the property interests afforded due process protection are not limited by narrow, rigid boundaries. As noted in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972):

" 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts...purposely left to gather meaning from experience....[T]hey relate to the whole

> domain of social and economic fact and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. *** [T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money." [Footnote and citations omitted] 408 U.S. at 571-2, 92 S.Ct. at 2706.

Roth reflects the current economic reality that citizens have vested property interests in numerous forms of wealth that are far removed from the traditional notions of "property". *Roth* recognizes that the Fifth Amendment's due process protection extends to other than traditional forms of property and the benefits provided by the state and federal governments are included.

> "One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours fourth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.
>
> The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth—forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more Americans depends upon a relationship to government." *Reich, The New Property,* 73 Yale L.J. 733 (1964).

In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), this Court expressly endorsed the notion that government benefits, including defense contracts, are important forms of property in modern-day America.

> "Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that 'society today is built around entitlement. *** Many of the most important entitlements now flow from government: subsidies of farmers and businessmen; routes for airlines and channels for television stations; *long term contracts for defense*, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; *to the recipients they are essentials, fully deserved, and in no sense a form of charity.*' " [Emphasis added] 397 U.S. at 262, 90 S.Ct. at 1017, fn. 8

This Court has extended due process protection to a wide range of government benefits. *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (social security); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and *Board of Regents of State Colleges v. Roth, supra*, (government employment); *Goldberg v. Kelly, supra*, (welfare benefits); *Wheeler v. Montgomery*, 397 U.S. 280, 90 S.Ct. 1026, 25 L.Ed.2d 307 (1970) (old age assistance benefits); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) and *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), (public education); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) (tax exemptions).

The expansion of the definition of property to include government benefits has created a need to define the limits

of due process protection. In *Roth, supra*, this Court said that procedural due process now extends "well beyond actual ownership of real estate, chattels or money," and said further:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.* *** Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or *understandings* that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." [Emphasis added] 408 U.S. at 577, 92 S.Ct. at 2709.

In order for a given government benefit to constitute a constitutionally protected property interest, the recipient of that benefit must have a legitimate claim of entitlement to the continued receipt of that benefit. The appellate court recognized this but erred in concluding on the basis of the holding in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), that in the area of government procurement, a prospective bidder does not have grounds to "claim more than a 'unilateral expectation' of access to the government bidding process." (App. A at p. A-22)

The decisions of this Court and lower federal court jurisprudence have identified two primary bases for

legitimate claims of entitlement that are sufficient to elevate a government benefit to the status of a constitutionally protected property interest: (1) statute, and (2) mutually explicit understandings between the government and the recipient of the benefit. The majority of entitlements are of course statutorily created, but this Court, on the same day that it decided *Roth, supra*, recognized that the manner in which the government administers the distribution of benefits may also give rise to "legitimate claims of entitlement." In *Sindermann, supra*, the Court discussed the respondent college teacher's claim of entitlement to continued employment as follows:

> "A teacher, like the respondent, who has held his position for a number of years, *might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure.* Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement, *United Steelworkers v. Warrier & Gulf Nav. Co.*, 363 U.S. 574, 579, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409, so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, *but that nonetheless may have created such a system in practice.* *** We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process, *but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'* " [Emphasis added] 408 U.S. at

602-603; 92 S.Ct. at 2700.

In *Geneva Towers Tenants Organization v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974), it was noted, "*Sindermann* demonstrates that the source [of a legitimate claim of entitlement] need not be explicit but can be implicit in the overall workings of a governmental program." *Id.* at 489.

The DOD's long-established regulations which allowed Rutter Rex access to procurement contracts for military apparel results in a legitimate claim of entitlement to future opportunities to bid on such contracts. The practice and policy of the DOD for over forty years was to permit and, at times to encourage Rutter Rex to bid for apparel procurement contracts. The extended business relationship between Rutter Rex and the DOD must be viewed in the context of economic reality. The result of the DOD's continuing acceptance of bids from Rutter Rex and its regular granting of contracts to Rutter Rex was that Rutter Rex took the financial and operational steps necessary to satisfy the DOD's future demands. Rutter Rex's reaction was that of a prudent business enterprise—it made capital expenditures and operational modifications which enabled it to meet the needs of a long standing reliable customer. Rutter Rex tailored those operations so that it could efficiently serve a customer which, in any given year, would account for a substantial portion of its business. Similar circumstances have been cited as a factor supporting the legitimacy of a claim of entitlement. In *Trumbull Division, Owens-Corning Fiberglass Corp. v. City of Minneapolis*, 445 F.Supp. 911 (D. Minn. 1978), the court stated:

> "Plaintiff here has more than a mere expectancy or abstract hope of license renewal; it has a

> legitimate claim of entitlement to its license. The investment necessary to carry on an asphalt manufacturing business could not be made unless there were an understanding that operations could continue year to year." *Id.* at 916.

The investment necessary to carry on a clothing manufacturing operation, which for a twenty-year period was designed to and satisfactorily did produce almost exclusively military garments, could not be made without the understanding that Rutter Rex would be permitted to bid on uniform procurement contracts in the future.

Several courts have recognized that there is a right to an equal opportunity for access to government procurement contracts. Chief Justice (then Judge) Burger described the hardships that arise from discontinuation of a long-standing business relationship with the government and then describes a contractor's rights in *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964), thusly:

> "Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences.
>
> "The consequences of administrative termination of all right to bid or contract, colloquially called "blacklisting" and formally called suspension or debarment, will vary, depending upon multiple factors: the size and prominence of the contractor; the ratio of his government business to non-government business; the length of his contractual relationship with the government; his dependence on that business; his ability to secure other business as a substitute for government

> business, These are some of the basic factors involved. The impact of debarment on a contractor may be a sudden contraction of bank credit, adverse impact on market price of shares of listed stock, if any, and critical uneasiness of creditors generally, to say nothing of 'loss of face' in the businesss community. These consequences are in addition to the loss of specific profits from the business denied as a result of debarment. We need not resort to a colorful term such as 'stigma' to characterize the consequences of such governmental action, for labels may blur the issues. But we strain no concept of judicial notice to acknowledge these basic facts of economic life.
>
> "Thus, to say that there is no 'right' to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts." *Id.* at 574.

It has also been held that: "It is well established that anyone hoping to contract with the United States has no property right to government contracts; only a right to an equal opportunity to seek government contracts." *Alaska Movers Ass'n. v. Brown*, 445 F.Supp. 363, 364 (D.D.C. 1978). *Accord, Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 370-371 (D.C. Cir. 1961). While Rutter Rex has not been "blacklisted", the DOD's small business set-aside regulations achieve the same result and impose the same economic hardships.

In rejecting Rutter Rex's constitutional claim, the

Fifth Circuit Court of Appeals committed serious errors. The court failed to recognize that a legitimate entitlement to a constitutionally protected property interest can arise from the circumstances of Rutter Rex's relationship with the government. After discussing those cases which state that there is a right to an equal opportunity for access to government contracts, the Fifth Circuit states:

> "None of these cases point to *any statute or regulation* creating a Fifth Amendment property interest in the circumstances of the present case." [Emphasis added] (App. A at fn. 22).

The court's statement implies that a Fifth Amendment property interest must be created by statute or regulation. After quoting the *Roth* standard for Fifth Amendment property interests, the Court remarks:

> "We are unaware of a single independent source in either state or federal law which would support Rutter Rex's claim of a Fifth Amendment property entitlement to participate in the awarding of government contracts." (App. A at p. A-21)

The significance of these statements is their revelation of the Fifth Circuit's failure to recognize that legitimate, constitutionally protected property interests may be based on "mutually explicit understandings"[3]; "the practices and policies"[4] of the DOD, "unwavering custom"[5]; "the

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[3] *Sindermann, supra*, 408 U.S. at 601, 92 S.Ct. at 2699; *Leis v. Flynt*, 439 U.S. 438, 443, 99 S.Ct. 698, 701, 58 L.Ed.2d 717 (1979).

[4] *Sindermann, supra*, 408 U.S. at 603, 92 S.Ct. at 2700.

[5] *Hermes v. Hein*, 511 F.Supp. 123, 125 (N.D. Ill. 1980).

overall workings of a government program"[6]; or "well-established patterns of practice"[7], as well as written law.

The error in the Court of Appeals' search for a statutorily created entitlement is compounded by the court's misplaced reliance on the following statement from this Court's decision in *Perkins v. Lukens Steel Co., supra*:

> "Like private individuals and businesses, the Government enjoys the unrestricted power...to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." (310 U.S. at 127, 60 S.Ct. at 876).

The *Perkins* Court did not mean to say that the government was not restricted by the Constitution. The quoted language dealt with the government's executive and legislative authority to impose conditions on contractors with which it deals and not with the question here presented. This Court in *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968), effectively reworded the *Perkins* statement to emphasize that it is not dispositive of constitutional issues:

> "There is of course no question that the Federal Government, *unless barred by some controlling constitutional prohibition*, may impose the terms and conditions upon which its money allotments to the States shall be disbursed..." [Emphasis added] (392 U.S. at 333, 88 S.Ct. at 2141, fn. 34).

If the Fifth Circuit's interpretation of *Perkins* is

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[6] *Geneva Towers Tenants Organization, supra*, at 489.

[7] *Hermes, supra.*

permitted to stand, it will endorse the concept that government agencies involved in procurement may establish the conditions that contractors must satisfy in dealing with the government, and may also exercise unfettered discretion in deciding which categories of citizens may bid on such contracts, according no significance to the possibility that a constitutional right may emanate from a contractor's long-standing relationship with the government. The Fifth Circuit's interpretation of *Perkins* removes such arbitrary decision-making from the scope of judicial review and places it beyond the reach of the Constitution. *Perkins* is not dispositive of Rutter Rex's constitutional claim and reliance upon it to this effect is an unwarranted extension of the *Perkins* doctrine.[8]

Where a constitutionally protected property interest is implicated, it must be determined whether the government action that deprives a citizen of this interest also deprives him of due process of law. In *Mathews v. Eldridge, supra*, this Court listed four factors "to be considered in assessing the validity of any administrative decision-making process": (1) the degree of potential deprivation; (2) the possible length of deprivation; (3) the fairness and reliability of the existing pretermination procedures; and (4) the public interest. (424 U.S. at 343-347; 96 S.Ct. at 907-909). An analysis of these factors in this case indicates that Rutter Rex has been deprived of its property

[8] Even as to the rule of standing for which *Perkins* is most often cited, its efficiency has eroded. *B. K. Instrument, Inc. v. U.S.*, 52 L.W. 2123 (2nd Cir. 8/4/83); *Haynes International Corp. v. McLucas*, 509 F.2d 245 (5th Cir. 1975); *Scanwell Laboratories, Inc., v. Schaffer*, 424 F. 859 (D.C. Cir. 1970).

entitlement without due process. The first two factors weigh heavily in favor of Rutter Rex. The degree of Rutter Rex's deprivation is substantial. The DOD's repetitive set-aside regulations completely and permanently foreclose Rutter Rex's future opportunity to bid on procurement contracts for products that it supplied to the DOD for over forty years as long as there are at least two small businesses interested in future contracts. The latter is a given. It goes without saying that mandatory repetitive set asides achieve the maximum duration of deprivation. The public interest in this case consists of two major concerns: (1) the efficient procurement of supplies in the case of a national emergency; and (2) the promotion of small businesses. Neither of these concerns warrants the sudden, complete and permanent deprivation of Rutter Rex's right to bid on apparel procurement contracts through an arbitrary decision-making process. Permitting large businesses an equal opportunity to bid on a fair proportion of such contracts would not significantly infringe on the policy of awarding government contracts to small businesses because of the high percentage of defense procurement contracts for apparel which traditionally have been allocated to small businesses. (See App. B at p. A-38)[9] Evaluation of the *Mathews* factors reveals that the magnitude of Rutter Rex's deprivation more than outweighs any speculative harm to the public interest in the small business program.

CONCLUSION

There is not the slightest doubt that the July 27,

[9] Furthermore, the national policy as expressed by the Small Business Administration is that "Small business concerns should not become dependent on continuing assistance under the Small Business Act from 'cradle to grave'..." (45 F.R. 15443, March 10, 1980)

1979 modifications to the Defense Acquisition Regulations have resulted in the total destruction of a forty year relationship between Rutter Rex and the government, an unfair and damaging result of agency action. This action was taken without according any consideration to the constitutional interest of Rutter Rex in continuing access to government procurement contracts. Had this interest been taken into account, a balancing of it and of the small business policies of the nation would have been required. This Court is urged to decide the basic federal law issue of whether Rutter Rex's right is constitutional in nature and deserving of protection against arbitrary deprivation resulting from the DOD regulations.

Respectfully submitted,

(SIGNED) HENRY J. READ

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APPENDIX "A"

J.H. RUTTER REX MANUFACTURING CO., INC.,

Plaintiff-Appellant,

v.

UNITED STATES of AMERICA, et al.,

Defendants-Appellees.

No. 82-3239

United States Court of Appeals,
Fifth Circuit

June 9, 1983

Manufacturer of military clothing, ineligible for Department of Defense program relating to set-aside of certain military procurement contracts for small business concerns because of its size, brought action asking court to declare program invalid and enjoin its further implementation by the Department of Defense. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., 534 F.Supp. 331, granted summary judgment in favor of the Department of Defense, and manufacturer appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, sitting by designation, held that: (1) Department of Defense procurement regulation providing that a procurement may be set aside for small business if the contracting officer anticipates receiving bids from at least two responsible small business concerns did not violate federal procurement statutes' preference for competition; (2) fact that Department of Defense procurement regulations did not establish a ceiling on the percentage of awards that

could be set aside for small business on an industry-by-industry basis did not put the regulations in violation of federal procurement statutes' "fair proportion" requirement; (3) Department of Defense procurement regulation providing that no set aside for a small business shall be disapproved merely because small business concerns are considered to be receiving a fair proportion of total contracts for supplies or services was not an unreasonable construction of the fair proportion mandate in the federal procurement statutes; (4) manufacturer did not have a Fifth Amendment property entitlement to access to the bidding process for awarding government contracts; and (5) federal procurement statutes and regulations promulgated thereunder providing for set asides for small business were rationally related to the sound legislative purpose of promoting small business in order to contribute to the security and economic health of the nation, and, therefore, such statutes and regulations did not violate the due process clause of the Fifth Amendment.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE,* POLITZ and GARWOOD, Circuit Judges.

TUTTLE, Circuit Judge:

This case is an appeal from a summary judgment in the United States District Court for the Eastern District

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* Circuit Judge of the Eleventh Circuit, sitting by designation.

of Louisiana, 534 F.Supp. 331. The plaintiff-appellant, J.H. Rutter Rex Manufacturing Company, Inc., ("Rutter Rex") contends (1) that United States Department of Defense ("DOD") regulations authorizing the "set aside" of certain government contracts for exclusive participation by small business concerns exceed statutory authority, and (2) that it has been unlawfully deprived of a constitutional property right of access to the government contract bidding process. Because we find that the disputed regulations are a proper exercise of the broad authority granted by Congress to government procurement agencies and that no constitutional protections of the type urged by Rutter Rex exist for access to the government bidding process, we reject the appellant's claims and affirm the holdings of the court below.

I.

Rutter Rex is an apparel manufacturer in New Orleans, Louisiana. Since it employs approximately 1500 persons in its combined operations, the appellant is ineligible to bid on certain government contracts which have been set aside for small businesses[1] pursuant to the Armed Services Procurement Act, 10 U.S.C. § 2301 *et seq.*, and regulations promulgated thereunder.

Over the last 20 years, Rutter Rex has operated its New Orleans plant almost exclusively for the production of garments procured by the U.S. Government. However, since 1976, the appellant has experienced gradually decreasing government business culminating with its failure to secure a single government contract in 1981. Rutter Rex contends that its loss of this lucrative source

[1] A small business concern in the apparel industryis defined by Small Business Administration regulations as one which employs fewer than 500 persons. 13 C.F.R. § 121.3-8 and § 121-Schedule A.

of business is the result of DOD regulations issued and enforced in violation of the powers granted to government procurement agencies by the Small Business Act and the Armed Services Procurement Act (hereafter referred to as the "procurement statutes"). It brings this action seeking to have these regulations declared invalid.

II.

In 1947, Congress passed the Armed Services Procurement Act which provides, "It is the policy of Congress that a fair proportion of the purchases and contracts under this Chapter be placed with small business concerns." 10 U.S.C. § 2301. The Senate Report accompanying this legislation noted that this requirement was grounded in a desire to diversify the Nation's defense production and thus add "production security in the event of any emergency and assist in establishing insurance against bottlenecks." S.Rep. No. 571, 80th Cong., 1st Sess. 6 (1947).

Congress extended the fair proportion requirement to all government procurements when it enacted the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251 *et seq.*) and the Small Business Acts of 1953 and 1958 (15 U.S.C. § 631 *et seq.*). The 1953 Act stated:

> It is the declared policy of the Congress that the government should aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns in order to serve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts for supplies and services for the Government be placed with small-business enterprises, and to maintain and strengthen the overall economy of the Nation.

15 U.S.C. § 631. The 1958 Act provided slightly more specific guidelines for procuring agencies attempting to comply with Congressional intent when it declared that government procurement contracts should be awarded to small business concerns when such awards are determined:

> 1. To be in the interest of maintaining or mobilizing the Nation's full productive capacity;
>
> 2. To be in the interest of war or national defense programs;
>
> 3. To be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns; or
>
> 4. To be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns ...

15 U.S.C. § 644(a).

In 1958, the DOD adopted regulations intended to implement the requirements of the procurement statutes.[2]

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[2] These regulations, originally known as the Armed Forces Procurement Regulations, are now entitled the Defense Acquisition Regulations and are set forth at 32 C.F.R. Part 7.

Though the Armed Services Procurement Act governs the procedures for DOD procurement, the DOD (like all federal agencies) is also bound by the strictures of the Small Business Act and has promulgated its regulations in conformance therewith. In fact, 15 U.S.C. § 639(d) evidences that Congress was particularly concerned that the DOD comply with the policies favoring small businesses. That Code section requires the DOD (but no other agency) to make a monthly report to Congress "showing the amount of funds appropriated to the Department of Defense which have been expended, obligated or contracted to be spent with small business concerns."

These regulations provided, *inter alia*, that certain government acquisitions would be "set aside for the exclusive participation of small business concerns." 32 C.F.R. 1-706.1(b). The regulations further provided that such set asides would occur "if the contracting officer determines that there is a reasonable expectation that (i) offers will be obtained from a significant number of responsible small business concerns and (ii) awards will be made at reasonable prices." 32 C.F.R. 1-706.3(a). In 1979, subpart (i) of the above regulation was amended to provide that bids need only be reasonably expected from "at least two responsible small business concerns." 32 C.F.R. 1-706.5.

This procedure for the determination of set asides was slightly altered in 1979 when the DOD issued new regulations providing that once a contracting officer successfully acquired a product under a small business set aside, all future requirements of that agency (or agency subdivision) for that product may continue to be so acquired until such time as the contracting officer determines that either of the two necessary conditions no longer exists. 32 C.F.R. § 1-706.1(f). These recently-promulgated regulations also provide that no set aside will be disapproved merely because "a large percentage of previous acquisitions of the item has been placed with small business concerns [or because] small business concerns are considered to be receiving a fair proportion of total contracts for supplies or services." 32 C.F.R. § 1-706.1(j)(i, vi).

Also, in 1978, Congress amended 15 U.S.C. § 644 to require the head of each federal agency to establish goals for the participation of small business concerns in the procurement of contracts of more than $10,000. 15 U.S.C. § 644(g).[3] Congress ordered that these goals should "realis-

[3] 15 U.S.C. § 644(g) provides:

tically reflect the potential of small business concerns to perform such contracts ..." 15 U.S.C. § 644(g). Though the head of each federal agency is required to justify a failure to meet such goals in an annual report to the Small Business Administration, 15 U.S.C. § 644(h), no sanctions are imposed for such failure and the goals do not as a matter of law have any impact on individual set aside decisions.

III.

The parties to this action vigorously dispute whether Rutter Rex has standing to challenge the validity of the regulations. Because the standing issue is not determinative, we assume, without deciding, that Rutter Rex has standing to contest these regulations.

IV.

A.

Rutter Rex makes two principal attacks on the DOD regulations. First, Rutter Rex notes that the procurement

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(Footnote 3 continued)

> The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency having values of $10,000 or more. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Federal Procurement Policy for final determination.

regulations promulgated by DOD provide both in theory and in practice for a 100 percent small business set aside of certain products. In the appellant's industry, the manufacture and marketing of apparel, over 90 percent of DOD procurements have been allocated to small business. Rutter Rex argues that such high levels of set asides clearly constitute more than a "fair proportion" of procurements in the apparel industry and that the regulations are thus in excess of statutory authority. Rutter Rex also asserts that the goal practices, as implemented by the DOD and other procurement agencies, contribute substantially to awards in excess of a fair proportion by placing additional pressure on procurement officers to make set asides, particularly in industries such as the appellant's where the great majority of participants are small business concerns.

Second, Rutter Rex contends that the significant percentage of set asides in particular industries violates the express direction of Congress for "full and free competition" in the procurement process. The appellant particularly focuses on the 1979 DOD regulation which allows a set aside whenever reasonable bids are anticipated from two or more responsible small business concerns. Rutter Rex contends that two bids can hardly constitute the open competition envisioned by Congress.

B.

Congress has delegated broad powers to federal agencies to achieve the purposes of the procurement statutes;[4] our review is therefore limited to determining

[4] *See* 10 U.S.C. § 2202:

> Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for

whether the disputed regulations are "reasonably related to the purposes of the enabling legislation." *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 280-81, 89 S.Ct. 518, 525-526, 21 L.Ed.2d 474 (1969); *Mourning v. Family Publications Service*, 411 U.S. 356, 364, 93 S.Ct. 1652, 1658, 36 L.Ed.2d 318 (1973). In *National Muffler Dealers Association v. United States*, 440 U.S. 472, 99 S.Ct. 1304, 59 L.Ed.2d 519 (1979), the Supreme Court added flesh to the bare bones of this loosely-worded test:

> In determining whether a particular regulation carries out the Congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the [agency's] interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute.

(Footnote 4 continued)

> procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicate or overlapping operations or functions.

See also 15 U.S.C. § 634(b)(6): "In the performance of, and with respect to, the functions, powers and duties vested in him by this chapter the [Small Business] Administrator may ... make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter."

Id. at 477, 99 S.Ct. at 1307.

In the present case, Rutter Rex bears a particularly heavy burden. The Supreme Court has long recognized the special judicial deference due administrative agencies in the area of procurement. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-28, 60 S.Ct. 869, 876-877, 84 L.Ed. 1108 (1940). *See also Hayes International Corp. v. McLucas*, 509 F.2d 247, 258 (5th Cir.1975). In construing the statutes relevant to the present action, this Court has noted the extraordinarily broad discretion bestowed on agencies by the Congress: "[the procurement statutes] simply require that a 'fair proportion' of government purchases and contracts be placed with small businesses. Congress left it to the agencies to implement this policy through regulations and practices of their own construction." *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1272 (5th Cir.1978).[5] This broad grant of power to procuring agencies is heightened considerably by the fact that Congress has never undertaken to define the term "fair proportion" despite its use in six separate statutes.[6]

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[5] *See also Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d [696], 699 (5th Cir.1973): "Congress ... has given the Small Business Administration the statutory authority and necessary discretion in awarding subcontracts to accomplish [the goal of development of small businesses]. The discretion as to which firm shall receive subcontracts and the decision as to which regulations shall govern procurement is left to the Small Business Administration." *Id.* at 703-04.

We also note that one of the primary purposes of the Armed Services Procurement Act of 1947 was to encourage the exercise of judgment and discretion by individual contracting officers. S.Rep. No. 571, 80th Cong., 1st Sess. (1947).

[6] S.Rep. No. 760, 93d Cong., 2d Sess., App. A, "Legislative History of the Phrase 'Fair Proportion' in Small Business Act" (1974). The six statutes which have utilized the term "fair proportion" in relation to procurement from small businesses are:

C.

With these principles in mind, we consider first Rutter Rex's contention that the DOD regulations invalidly limit competition in the government procurement process. While it is certainly true that the procurement acts recognize the vital role of "full and free competition" in the maintenance of this Nation's economic health,[7] the Congress has explicitly stated that "[s]uch security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed." 15 U.S.C. § 631(a). This statement of purposes, together with the protections provided for small businesses in the procurement statutes, makes it clear that Congress intended these statutes as a means to protect small businesses from the ravages of unchecked competition so as to ensure

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(Footnote 6 continued)

1. The Armed Services Procurement Act of 1947, Section 2(b), 10 U.S.C. § 2301;

2. The Selective Service Act of 1948, Section 18(a), 50 U.S.C.App. § 468(a) (1970);

3. The Federal Property and Administrative Services Act of 1949, Section 302(b), 41 U.S.C. § 252(b) (1970);

4. The Defense Production Act Amendments of 1951, Section 714(f)(2);

5. The Small Business Act of 1953; and

6. The Small Business Act of 1958, Section 2[2], 15 U.S.C. § 631 (1970).

[7] "The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation ..." 15 U.S.C. § 631(a). *See also* 10 U.S.C. § 2305(a).

a vibrant, diversified economy; this Court recognized as much in *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir.1973) where it stated:

> The purpose of the [Small Business] Act is to assist small business concerns. The Act is based on the premise that such firms are unable to compete effectively in the marketplace and therefore cannot secure government procurement contracts awarded through competitive bidding. By increasing their participation in government procurement, however, these firms can eventually become self-sufficient, viable businesses capable of competing effectively in the marketplace.

Id. at 708.[8] Rutter Rex therefore fundamentally misconstrues the procurement statutes when it interprets "full and free competition" as a means to achieve the statutes' purposes rather than an end in itself; though the legislative history of the relevant statutes does not shed much light on this question, Congress has apparently judged that it is in the best interests of the American people to risk the possibility of slightly higher costs for today's government purchases in return for the dividends of an economy and national defense that are not dependent on a small number of potentially vulnerable producers.[9]

More specifically, we conclude that amended 32

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[8] *See also Kinnett Dairies*, 580 F.2d at 1274: "[T]he Small Business Act and regulations favoring small businesses modify these more general requirements that [agencies] procure goods at 'competitive market prices ...' "

[9] *Kinnett Dairies*, 580 F.2d at 1275: "We recognize that the policies of the Small Business Act are to some extent inconsistent with what might be perceived as the primary function of the [DOD procurement regulations], to supply the procurement needs of the armed forces at minimum cost."

C.F.R. § 1-706.3(a) does not violate the statutory preference for competition simply because it provides that a procurement may be set aside if the contracting officer anticipates receiving bids from at least two responsible small business concerns. Rutter Rex simply ignores that portion of the regulation which requires that set aside awards be made only at reasonable prices. 32 C.F.R. § 1-706.3(a)(ii). Read as a whole, the regulations can only be said to enhance the twin (yet sometimes divergent) goals of the procurement acts: the promotion of small business interests and the efficient and economical acquisition of goods and services by the government.[10]

D.

We now turn to the assertion of Rutter Rex that the regulations in question are invalid since they do not establish a ceiling on the percentage of awards which may be set aside in any particular industry. Rutter Rex notes that over 90 percent of the awards for which it would otherwise be eligible to compete have been set aside and argues that no possible construction of the term "fair proportion" might include set asides of such lofty proportions.

However, since DOD set asides in 1980 were only 7.2 percent of its total procurement awards,[11] the appellant's argument rests on the assumption that Congress intended

[10] Section 1-706.3(a) is also consistent with the long-standing congressional desire that a greater portion of government procurement contracts be placed with small businesses. *See* discussion, section IV.D. *infra*. This specific quantification of a minimal number of necessary bidders appears to best serve this purpose while maintaining the head-to-head competition necessary to assure economical government purchses.

[11] This figure was derived from the district court opinion. 534 F.Supp. at 338. Neither party took exception to the trial court's reliance on this figure.

the fair proportion mandate to be applied on an industry-by-industry (or even product-by-product) basis rather than to the collective pool of DOD procurements. In support of this contention, the appellant notes that the Small Business Act requires that a "fair proportion of the *total* purchases and contracts" (emphasis added) of each agency be placed with small businesses whereas the Armed Services Procurement Act omits the word "total" and only requires that small businesses receive a "fair proportion of the purchases and contracts" of the DOD. The appellant contends that this disparity evidences a deliberate attempt by Congress to place defense procurements on a different footing whereby fair proportion would be calculated on an industry-by-industry basis rather than on the basis of total defense procurements.

Unfortunately for the appellant, its imaginative argument goes no further. The appellant does not direct this Court to any portion of the legislative history of either statute which would support its interpretation nor does it advance a single ground on which defense procurements might reasonably be distinguished for these purposes from procurements of other federal agencies. In fact, the voluminous legislative histories of these government procurement acts, while not casting any direct light on this dilemma, evidence a consistent and uninterrupted eagerness on the part of Congress to place a greater number of procurement contracts, defense and otherwise, in the hands of small businesses.[12] Despite these many volumes of

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[12] *See, e.g.*, Hearings:

Small Business Procurement Expansion and Simplification Act: Hearings Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business, 95th Cong., 2d Sess. (1978); DOD Procurement Policies and Practices: Hearings Before the Subcomm. on Minority Enterprise and General Oversight of the House

committee reports, hearing transcripts, and floor debates

(Footnote 12 continued)
Comm. on Small Business, 95th Cong., 2d Sesss. (1978); Oversight Hearings on Small Business Administration Programs and Activities: Hearings Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business, 94th Cong., 2d Sess. (1976); Procurement Assistance Programs of the Small Business Administration: Hearing Before the Senate Select Comm. on Small Business, 94th Cong., 1st Sess. (1975); The Position of Small Business in Procurements for Federally Supported Programs: Hearing Before the Subcomm. on Government Procurement and International Trade of the House Permanent Select Comm. on Small Business, 93rd Cong., 1st Sess. (1973); Commission on Government Procurement Recommendations and Labor Surplus Area Procurement: Hearings Before the Subcomm. on Government Procurement of the Senate Select. Comm. on Small Business, 93rd Cong., 1st Sess. (1973); The Position and Problems of Small Business in Government Procurements: Hearing Before the Subcomm. on Small Business, 92d Cong., 1st Sess. (1971); Small Business and Labor Surplus Set-Asides and 8(a) Contracts: Hearing Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business, 91st Cong., 2d Sess. (1970); Small Business in Government Procurement—Before and After Defense Cutbacks, Hearings Before the Subcomm. on Government Procurement of the House Select Comm. on Small Business, 91st Cong., 2d Sess. (1970); The Position of Small Business in Government Procurement: Hearings Before Subcomm. No. 2 on Government Procurement and Economic Concentration of the House Select Comm. on Small Business, 90th Cong., 1st & 2nd Sess. (1967-1968); government Procurement—1966: Hearing Before the Subcomm. of the Senate Select Comm. on Small Business, 89th Cong., 2d Sess. (1966); Small Business Subcontracting and Set-Aside Programs: Hearings Before Subcomm. No. 2 on Government procurement of the House Select Comm. on Small Business, 89th Cong., 1st Sess. (1965); The Role of Small Business in Government Procurement: Hearings Before the Subcomm. of the Senate Select Comm. on Small Business, 88th Cong., 2d Sess. (1964); Government Small Business Procurement Practices and Programs: Hearings Before Subcomm. No. 2 on Government Procurement of the House Select Comm. on Small Business, 88th Cong., 1st Sess. (1963); The Role of Small Business in Government Procurements—1962-1963; Hearing Before the Senate Select Comm. on Small Business, 87th Cong., 2d Sess. (1962); The Role of Small Business in Government Procurement—1961, Hearings Before the Subcomm. of the Senate Select Comm. on Small Business, 87th Cong., 1st Sess. (1961); government Procurement—1960: Hearings Before the Subcomm. of the Senate Select Comm. on Small Business, 86th Cong., 2d Sess. (1960).

pertinent to the Small Business Act and the Armed Services Procurement Act, the appellant fails to direct our attention to any evidence of Congressional concern that large businesses are being victimized by the operation of these statutes and regulations.

The absence of any such evidence is especially compelling in light of the intense scrutiny to which these statutes have been subjected[13] and the numerous amendments of both Acts.[14] In this regard, we take special note

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(Footnote 12 continued)
Reports:

House Select Comm. on Small Business Government Procurement Within Military and Civilian Agencies, H.R.Rep. No. 1749, 94th Cong., 2d Sess. (1976); Senate Select Comm. on Small Business: Twenty-Sixth Annual Report, S.Rep. No. 636, 94th Cong., 1st Sess. (1976); Senate Select Comm. on Small Business, Twenty-Fifth Annual Report of the Select Comm. on Small Business, S.Rep. No. 13, 94th Cong., 1st Sess. (1975); Senate Select Comm. on Small Business, Small Business Aspects of Selected Recommendations of the Commission on Government Procurement, S.Rep. No. 760, 93rd Cong., 2d Sess. (1974); Senate Select Comm. on Small Business; Twenty-Third Annual Report, S.Rep. No. 760, 93rd Cong., 2d Sess. (1974); House Select Comm. on Small Business, Small Business Procurement Policies of Federally Supported Programs, H.R.Rep. No. 449, 93rd Cong., 1st Sess. (1973); House Select Comm. on Small Business, The Position and Problems of Small Business in Government procurement, H.R.Rep. No. 1609, 92nd Cong., 2d Sess. (1972); House Select Comm. on Small Business in Government—Before and After Defense Cutbacks, H.R.Rep. No. 1608, 91st Cong., 2d Sess. (1970); House Select Comm. on Small Business, The Position of Small Business in Government Procurement, H.R.Rep. No. 1975, 90th Cong., 2d Sess. (1968); House Select Comm. on Small Business, Small Business Subcontracting and Set-Aside Programs, H.R.Rep. No. 2341, 89th Cong., 2d Sess. (1966); House Select Comm. on Small Business, Government Small Business Procurement Policies and Programs, H.R.Rep. No. 1937, 88th Cong., 2d Sess. (1964); House Select Comm. on Small Business, Small Business and Government Procurement, H.R.Rep. No. 2562, 87th Cong., 2d Sess. (1962).

[13] *Id.*

[14] *E.g.*, amendments to the Armed Services Procurement Act:

of a 1974 Report issued by the U.S. Senate Select Committee on Small Business after a series of hearings on the government procurement process.[15] The hearings and the report focus specifically on certain recommendations of the Commission on Government Procurement,[16] including that the Congress, "Establish new standards for annually measuring the performance of procuring agencies and their prime contractors in using small businesses. Standards for measuring performance, including the sound use of set aside techniques, should assess progress made in assisting small businesses to obtain a fair proportion of awards—not just statistical percentages."

In its consideration of this proposal, the Senate Committee specifically addressed the possibility of "a fair

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(Footnote 14 continued)
65 Stat. 700 (1951); 69 Stat. 551 (1955); 70A Stat. 130 (1956); Pub.L. 85-800, 72 Stat. 967 (1958); Pub.L. 87-653, 76 Stat. 528 (1962); Pub.L. 90-268, 82 Stat. 50 (1968); Pub.L. 93-356, 88 Stat. 390 (1974); Pub.L. 96-513, 94 Stat. 2926 (1980); Pub.L. 97-86, 95 Stat. 1117 (1981); Pub.L. 97-375, 96 Stat. 1821 (1982).

Amendments to Small Business Act:

69 Stat. 225 (1955); Pub.L. 85-4, 71 Stat. 4 (1957); Pub.L. 87-305, 75 Stat. 666 (1961); Pub.L. 88-560, 78 Stat. 786 (1964); Pub.L. 89-754, 80 Stat. 1295 (1966); Pub.L. 90-104, 81 Stat. 268, 269 (1967); Pub.L. 91-596, 84 Stat. 1618 (1970); Pub.L. 92-385, 86 Stat. 554, 555 (1972), Pub.L. 93-386, 88 Stat. 742 (1974); Pub.L. 95-89, 91 Stat. 553-562 (1977); Pub.L. 95-507, 92 Stat. 1760-1762 (1978); Pub.L. 96-302, 94 Stat. 833-852 (1980); Pub.L. 97-95, 95 Stat. 767-780 (1981).

These lists are not a complete documentation of the amendments of the statutes, but provide an illustration of the intensive oversight by Congress of the operation of the statutes.

[15] S.Rep. 760, 93d Cong., 2d Sess. (1974).

[16] This Commission was created by Congress in 1969 to review the federal procurement process and recommend ways to improve the process. P.L. 91-129 (Nov. 26, 1969), noted in 41 U.S.C. § 251.

proportion projection based on an industry-by-industry analysis."[17] In rejecting the blanket imposition of such a system, the Committee quoted the testimony of John M. Malloy, Deputy Assistant Secretary of Defense for Procurement, that:

> Extension of the present system to provide an optimum measure would involve analysis of many thousands of individual procurement actions, proposed to be made and already made, and analysis of the potential (or actual) share for small businesses. We simply do not have the capability of making projections in that detail, nor of analyzing the circumstances surrounding individual procurements at a level above the purchasing activity. Nor do I think we could gear up to cope with it.[18]

Thus, in 1973, sixteen years after the initial promulgation of the Defense Acquisition Regulations, Congress was unequivocally notified that the Defense Department was not applying the fair proportion standard on an industry-by-industry basis. Furthermore, this Senate Committee specifically relied on the above testimony of a DOD official in concluding that an industry-by-industry analysis should be applied only on a very limited test basis. It has been oft-stated that "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay v. Federal Communications Commission*, 443 F.2d 638, 646-47 (D.C.Cir.1970).[19]

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[17] S.Rep. 760, 93d Cong., 2d Sess. 14.

[18] *Id.* at 14-15.

[19] *See also, North Haven Board of Education v. Bell*, 456 U.S.

Our conclusion gains additional support from decisions of the Comptroller General that the "fair proportion" requirement is applicable to the totality of government procurements. *J.H. Rutter Rex Manufacturing Co., Inc.*, Comp.Gen. B-190905 (July 11, 1978); *Fermont Division, Dynamics Corporation of America*, Comp.Gen. B-195431 (June 23, 1980). Such decisions of the Comptroller General are entitled to special deference given the complexities and intricacies of government purchasing decisions. *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301 (D.C.Cir.1971); *Hayes International*, 509 F.2d at 258 n. 17; *Kinnett Dairies*, 580 F.2d at 1271-72.[20]

Rutter Rex levels a specific attack at 32 C.F.R. § 1-706.1(j)(vi) which provides that no set aside shall be disapproved merely because "small business concerns are considered to be receiving a fair proportion of total contracts for supplies or services." Rutter Rex contends that this provision allows set asides without any reference to the fair proportion statutory language and may result in

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(Footnote 19 continued)
512, 102 S.Ct. 1912, 1925, 72 L.Ed.2d 299 (1982); *United States v. Rutherford*, 442 U.S. 544, 554 n. 10, 99 S.Ct. 2470, 2476 n. 10, 61 L.Ed.2d 68 (1976); *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969); *Florida v. Matthews*, 526 F.2d 319, 324 (5th Cir.1976).

[20] Even if we concluded that Congress intended the fair proportion standard to apply on an industry-by-industry basis, it is unlikely that Rutter Rex would be entitled to relief. In *Basic-Witz Furniture Industries, Inc.*, 41 Comp.Gen. 649 (1962), the Comptroller General ruled that the placement of 90 percent of government contracts for wooden household furniture with small business concerns did not violate the fair proportion standard where over 99 percent of that industry's participants were small businesses. Likewise, in the present case, according to figures provided for the year 1977 by Andrew Canellas, the Director of the Industry Analysis Division of the Small Business Administration, 95.8 percent of firms in the textile mill products industry were small business concerns.

small businesses actually receiving far in excess of a fair proportion of government contracts.

As noted by the government in its brief, this dispute boils down to a question of whether the fair proportion mandate constitutes a floor or a ceiling on the allocation of government contracts to small businesses. We are unable to conclude that the DOD's apparent decision that the mandate is a floor constitutes an unreasonable construction of the statutory language. The fair proportion standard is not an end in itself, but a means of enforcing the purposes of the Small Business Act and the Armed Services Procurement Act, *i.e.*, the protection of our country in time of national emergency and the promotion of its economic well-being. Given the exceptional deference due decisions of administrative agencies charged with implementing congressional desires and the absence of any evidence of a contrary congressional purpose, we may not overturn the agency determination that Congress intended small businesses to receive *at least* a fair proportion of government procurement contracts.[21]

Finally, we briefly consider the appellant's challenge to the goal practices of the government. The goals are not the creation of the administrative agencies but are a specific direction of Congress. 15 U.S.C. § 644(g). We concur with the district court that "[t]he goals do not determine which contracts will be set aside; the goals set are sometimes not attained. Their function is rather to gauge the effectiveness of the small business program." 534

[21] We also note that 15 U.S.C. § 644(a) apparently authorizes set asides in certain circumstances without any reference to the fair proportion standard when it provides that awards shall be set aside when determined "(1) To be in the interest of maintaining or mobilizing the Nation's full production capacity [or] (2) to be in the interest of war or National defense programs ..."

F.Supp. at 340. The appellant has not alleged that the goal practices are unconstitutional nor has it presented any evidence that agency implementation of the goal practices is arbitrary and capricious or in excess of statutory authority; we thus decline to interfere with this Congressional effort to assure compliance with a legitimate legislative program.

V.

Rutter Rex also contends that it has unconstitutionally been denied access to the bidding process for government contracts. Our analysis begins with the question of whether Rutter Rex has a constitutional property interest in equal access to the bidding process.

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the Supreme Court wrote:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it ... Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules of understanding that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577, 92 S.Ct. at 2709. We are unaware of a single independent source in either state or federal law which would support Rutter Rex's claim of a Fifth Amendment property entitlement to participate in the awarding of

government contracts.[22] In fact, the Supreme Court in *Lukens Steel* stated, "Like private individuals and businesses, the Government enjoys the unrestricted power ... to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." 310 U.S. at 127, 60 S.Ct. at 876.[23] This Court is not cognizant of any subsequent jurisprudence which would diminish the vitality of the Supreme Court's declaration and provide Rutter Rex with any grounds to claim more than a "unilateral expectation" of access to the government bidding process.

Were we not otherwise convinced of the correctness of this result, our decision appears compelled by the prior ruling of this Court in *Ray Baillie*. In that case, several small business concerns which had previously performed contracts to collect refuse from the Homestead (Florida) Air Force Base brought suit when the Small Business Administration denied their demands for an opportunity to continue to compete for the contract. The SBA in turn

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[22] The cases cited by Rutter Rex do not support its claim. The cases may be categorized as standing for one of the following holdings. First, that a person who contends that he or she was invalidly denied access to the government bidding process possess standing to bring an action challenging such denial. *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C.Cir.1961). Second, that a person may not be denied access to the government bidding process absent procedural regulations authorizing or governing such denial. *Gonzalez v. Freeman*, 334 F.2d 570 (D.C.Cir.1964). Finally, that when Congress delineates specific qualifications for potential bidders, a person may not be denied access to the bidding process if he or she meets those qualifications. *Schraier v. Hinkel*, 419 F.2d 663 (D.C.Cir.1969). None of these cases point to any statute or regulation creating a Fifth Amendment property interest in the circumstances of the present case.

[23] *See also United States v. New Orleans Public Service, Inc.*, 553 F.2d 459, 469 (5th Cir.1977). Of course, in making such decisions, the government is subject to constitutional due process requirements. *Ray Baillie*, 477 F.2d at 709.

negotiated the contract with a black-owned competitor of the plaintiffs pursuant to a newly-promulgated program to benefit businesses owned by "disadvantaged persons."

After rejecting the plaintiffs' claim that the minority program violated statutory authority, the Court summarily dismissed their constitutional challenge. The Court stated, "[W]e cannot accept the plaintiffs' argument that the [minority] program is unconstitutional because the plaintiffs may be disadvantaged competitively. *There is no constitutional duty to offer government procurement contracts for competitive bidding.*" 477 F.2d at 709 (emphasis added).

Since no fundamental rights are implicated, we need only determine whether the contested socio-economic legislation rationally relates to a legitimate governmental purpose.[24] *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485-86, 90 S.Ct. 1153, 1161, 1162, 25 L.Ed.2d 491 (1970). Our previous discussion adequately demonstrates that the procurement statutes and the regulations promulgated thereunder are rationally related to the sound legislative purpose of promoting small businesses in order to contribute to the security and economic health of this Nation.

AFFIRMED.

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[24] A second predicate to the application of this lesser standard of review (as opposed to the strict scrutiny standard of review and its requirement of a compelling governmental interest) is that Rutter Rex not be a member of a suspect class such as a racial minority. *United States v. Kras*, 409 U.S. 434, 446, 93 S.Ct. 631 [638], 34 L.Ed.2d 626 (1973). Needless to say, corporations such as Rutter Rex are not entitled to such protection.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

J. H. RUTTER REX MANUFACTURING CO., INC. — CIVIL ACTION

NO. 80-2865

VERSUS

SECTION "E" (3)

UNITED STATES OF AMERICA
HAROLD BROWN, SECRETARY OF DEFENSE
LT. GENERAL GERALD J. POST,
DIRECTOR, DEFENSE LOGISTICS AGENCY
GENERAL EMMETT BOWERS, COMMANDER,
DEFENSE PERSONNEL SUPPORT CENTER
FRANK L. COCCIA, DIRECTOR, CLOTHING
AND TEXTILES DIRECTORATE, DEFENSE
PERSONNEL SUPPORT CENTER,

DEFENDANTS

DEROSSI & SON COMPANY,

INTERVENOR

Daniel Lund, Esq.
Attorney for Plaintiff

Elizabeth O'Connell, Asst. U.S. Atty.
June Rose Carbone, Atty., Dept. of Justice
Sandra M. Schraibman, Atty., Dept. of Justice
Attorneys for Defendants

Phillip A. Wittmann, Esq.
Dennis J. Riley, Esq.
Attorneys for Defendant-Intervenor

CASSIBRY, District Judge:

MOTIONS FOR SUMMARY JUDGMENT

This action is before the court on cross-motions of the parties for summary judgment.[1] At issue is the legality of the Department of Defense ("DOD") regulations governing the set-aside of certain military procurement contracts for small business concerns, codified at 32 C.F.R. Part. 7. Plaintiff, a manufacturer of military clothing, ineligible for the program because of its size,[2] asks the court to declare the program invalid and enjoin its further implementation by the Department of Defense. Plaintiff claims that the program results in the award of more than a "fair proportion" of government contracts to small businesses in the clothing industry, in violation of the due process clause of the Fifth Amendment to the U.S. Constitution, the Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(E) (1976) and the "fair proportion" language of the Armed Forces Procurement Act, 10 U.S.C. § 2301 (1976), and the Small Business Act, 15 U.S.C. § 631 (1976).

Defendants, the Secretary of Defense, the Director of the Defense Logistics Agency ("DLA"), the Commander of the Defense Personnel Support Center ("DPSC") and the Director of the Clothing and Textiles Directorate of the DPSC, are responsible for clothing procurement for the military services and for uniformed civilian personnel of

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[1] Defendant-intervenor's motion to dismiss will be treated as a motion for summary judgment as well, since matters outside the pleadings have been taken into consideration in deciding the motion.

[2] In its plants in New Orleans and Franklinton, Louisiana, and Columbia, Mississippi, plaintiff employed roughly 1500 people during periods of full production. A small business concern as here pertinent is defined by Small Business Administration regulations as one which employs fewer than 500 persons. 13 C.F.R. § 121.3-8 and § 121-Schedule A.

the Department of Defense ("DOD"). Defendant-intervenor is a qualified small business clothing manufacturer with a direct interest in the continuation of the set-aside program.

Upon careful consideration of the voluminous pleadings and exhibits filed in this action, as well as the argument of counsel, and there being no material fact in issue, the court grants the defendants' and defendant-intervenor's motions for summary judgment.

I. BACKGROUND

In 1947, Congress passed the Armed Forces Procurement Act, declaring that: "It is the policy of Congress that a fair proportion of the purchases and contracts under this chapter be placed with small business concerns." 10 U.S.C. § 2301 (1976). That language was extended to a "fair proportion" of total government contracts with the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 252(b) (1976) and the Small Business Acts of 1953 and 1958, 15 U.S.C. § 644 (1976). The Small Business Act requires that government agencies award procurement contracts to small business concerns when the award is determined

> (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns ...[3]

[3] 15 U.S.C. § 644(a) (1976).

The Department of Defense adopted small business regulations in 1957 to implement the Armed Forces Procurement Act. Part 7 of the Armed Forces Procurement Regulations[4] echoed the "fair proportion" language of the statute:

> 1-702 (a) It is the policy of the Department of Defense to place a fair proportion of its total purchases and contracts for supplies, research and development, and services ... with small business concerns.

To implement this long-standing policy, the regulations provide that the entire amount of a contract shall be set aside for exclusive small business participation if the contracting officer finds certain conditions present. This "set-aside" program operates to aid small business whenever there is a reasonable expectation that at least two responsible small businesses will make offers, and that awards of contracts will be made at reasonable prices. Once a contract has been awarded in the set-aside program, all future requirements by the purchasing office for that particular product or service are subject to a "repetitive set-aside", as long as the same reasonable expectations are present.[5] The fact that a large percentage of previous

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[4] These regulations have been incorporated with only slight modification into the Defense Acquisition Regulations, 32 C.F.R. Part 7, which now govern military procurement.

[5] 32 C.F.R. § 1-706.5 provides:

> (a) the entire amount of a contract shall be set aside for exclusive small business participation...if the contracting officer determines that there is a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices....Total set asides shall not be made unless such a

acquisitions of the item has been placed with small businesses, or that small businesses are considered to be already receiving a fair proportion of total contracts, is irrelevant to the decision to set aside a particular contract.[6]

Plaintiff urges that the program outlined by the

(Footnote 5 continued)

> reasonable expectation exists. Although past acquisition history of the item or similar items is always important, it is not the only factor which should be considered in determining whether a reasonable expectation exists.

32 C.F.R. § 1-706.1(f) provides:

> Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall be acquired on the basis of a repetitive set-aside. This procedure will be followed unless the contracting officer determines that there is not a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices.

Section 1-706.1(f) was added effective July 27, 1979. In addition, section 1-706.5(a)(i) was changed in 1979 from "...offers will be obtained from *a sufficient number of* responsible..." to read, "...offers will be obtained from *at least two* responsible...". Plaintiff attributes its loss of business with the government to these changes. Defendants maintain that the changes were not consequential.

[6] 1-7061(j) provides:

None of the following is, in itself, sufficient cause for not making a set-aside:

> (i) a large percentage of previous acquisitions of the item has been placed with small business concerns;
>
> * * * *
>
> (vi) small business concerns are considered to be receiving a fair proportion of total contracts for supplies or services;...

above regulations, by requiring repetitive set-asides and by providing that bids from only two small businesses will validate the set-aside of a contract, does not satisfy the statutory mandate for "free and full" competition embodied in the Armed Forces Procurement Act[7] and the Small Business Act.[8]

II. STANDING

Before analyzing plaintiff's claims for declaratory and injunctive relief, defendants' argument that plaintiff lacks standing must be addressed. Defendants' earlier

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[7] 10 U.S.C. § 2305(a) provides:

> Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned....

[8] 15 U.S.C. § 631(a) provides:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government...be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation.

motion to dismiss for lack of standing was denied by minute entry on March 13, 1981. The government defendants and defendant-intervenor urge the court to reconsider its prior ruling in the motions now before the court. Although as a general rule courts should not reconsider issues which have already been decided in an action, *Messenger v. Anderson*, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152 (1912), prior rulings have no res judicata effect and may be reconsidered in light of newly announced legal doctrine. *Industrial Workers of the World v. Clark*, 385 F.2d 687 (D.C.Cir. 1967), *cert. denied*, 390 U.S. 948, 88 S.Ct. 1036, 19 L.Ed.2d 1138 (1968). *See also United States v. Horton*, 622 F.2d 144, 148 (5th Cir. 1980); *Wm. G. Roe & Company v. Armour & Company*, 414 F.2d 862 (5th Cir. 1969). On March 25, 1981, the District of Columbia Court of Appeals issued a thoughtful analysis of the problem of standing in the government procurement arena, *Control Data Corporation v. Baldridge*, 655 F.2d 283, which this court finds instructive. After careful reexamination of the problem of standing under the facts presented by this case, I find again that plaintiff has standing to invoke judicial review of the DOD regulations at issue here.

Under Fifth Circuit jurisprudence, there is a three-part test for standing to contest the validity of agency actions: 1) the challenged action must result in injury in fact to the plaintiff; 2) the interest invaded must be arguably within the zone of interest to be protected by the statute or constitutional guarantee in question; and 3) there must be no statutory prohibition of judicial review. *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1066 (5th Cir. 1979); *Baker v. Bell*, 630 F.2d 1046, 1050 (5th Cir. 1980).

A. Injury in Fact

Plaintiff's stake in the outcome of this controversy is sufficiently direct and concrete to satisfy the constitutionally-compelled injury in fact requirement for standing. See *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Duke Power Co. v. Caroline Environmental Study Group, Inc.*, 438 U.S. 59, 73; 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). Plaintiff alleges that the percentage of DPSC contracts set aside for small business has effectively precluded it from participating in bidding for the type of government procurement contracts for which it successfully bid over the past twenty years or more. Plaintiff claims injury from plant closings and employee lay-offs which allegedly result directly from the implementation of DOD small business regulations and goal practices. Causation of plaintiff's injuries, while not clear-cut, is not "merely speculative". *See Warth v. Seldin*, 422 U.S. 490, 507, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Courts have held that an allegation of economic harm to a competition interest was sufficient to satisfy the injury in fact requirement of standing. *Marshall and Ilsey Corporation v. Heimann*, 652 F.2d 685, 692-93 (7th Cir. 1981). I have no serious doubt that plaintiff's loss of government business was caused at least by the government's small business program.

In addition, plaintiff meets the constitutional requirement for standing because its claimed injury is "likely to be redressed by a favorable decision." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100; 99 S.Ct. 1601; 60 L.Ed.2d 66 (1979), citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45; 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S.

252, 262; 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Plaintiff satisfies this court that the competitive harm alleged would be remedied by the requested relief. If this court were to issue declaratory or injunctive relief against the operation of the small business set-aside program where it operated to effectively exclude plaintiff from bidding on any contract, plaintiff's share of DOD contract awards would most likely rise.

Injury in fact has been found in cases involving both "disappointed bidders", who actually bid on a given contract, *see, e.g., Kinnett Dairies, Inc. v. Farrow,* 580 F.2d 1260 (1978); *Hayes Intearnational Corp. v. McLucas,* 509 F.2d 247 (5th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 123, 46 L.Ed.2d 92 (1975), and "frustrated bidders" who are precluded from continuing their relationship as a government supplier by a change in regulations, *see, e.g., Ballerina Pen Co. v. Kunzig,* 433 F.2d 1204 (D.C. Cir. 1970), *cert. dismissed,* 401 U.S. 950, 91 S.Ct. 1186, 28 L.Ed.2d 234 (1971); *Ray Baillie Trash Hauling, Inc. v. Kleppe,* 477 F.2d 696 (5th Cir. 1973); *cert. denied,* 415 U.S. 914, 94 S.Ct. 1410, 39 L.Ed.2d 468 (1974); *Control Data Corporation v. Baldridge,* 655 F.2d 283 (D.C. Cir. 1981). Thus although plaintiff has not pointed to any specific contract on which it was wrongfully denied the opportunity to bid, plaintiff has suffered an interruption of a long-standing relationship with the government as a successful bidder on government contracts. I therefore find that plaintiff has satisfied the first part of the standing test.

B. Zone of Interest

Injury in fact alone is not sufficient to merit standing, however. Plaintiff must also demonstrate that its interests fall "arguably within the zone of interests to be

protected or regulated" by the statutes or constitutional guarantees relied upon. *Sierra Club v. Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), cited in *American Federation of Government Employees, AFL-CIO v. Stetson*, 640 F.2d 642, 646 (5th Cir. 1981); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Although this limitation of the standing doctrine beyond injury in fact has been termed "prudential" rather than constitutional, the duty to apply this limitation in the instant case is nondiscretionary. *Contra, Peoples Gas, Light & Coke Co. v. U.S. Postal Service*, 658 F.2d 1182, 1202 (7th Cir. 1981) (Campbell, J., dissenting). The Fifth Circuit has consistently applied this standard to complaints arising from agency action taken pursuant to a particular statutory mandate where there exists no specific congressional authorization of review, as is the case here.

Plaintiff seeks to avoid the application of the zone of interest test by urging that it deserves standing in order to prosecute the public interest in agencies not exceeding their statutory mandates. In *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), the court held that a disappointed bidder in a government procurement contract has standing under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA"), thereby dispensing with the old "legal interest" test of *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), which had deprived unsuccessful bidders standing to challenge the legality of bidding procedures. The *Scanwell* court determined that allowing disappointed bidders to bring suit would permit them to "vindicate their very real interests" and further as well "the public interest in having agencies follow the regulations which control government contracting." *Id.* at 864, quoted in *Control Data Corp.*, 655 F.2d at 292.

Plaintiff here alleges not the failure of DOD to follow its own procurement regulations in awarding a contract, but rather the illegality of the regulations. After a careful and detailed discussion of the problem of standing in the bidder context, the D.C. Circuit Court declined to extend the *Scanwell* rationale "beyond its 'disappointed bidder' context." *Control Data Corporation* 655 F.2d at 292. According due respect to the expertise of the D.C. Circuit in these matters, *see Union Carbide Corporation v. Train*, 73 F.R.D. 620, 622 (S.D.N.Y. 1977), I find that plaintiff here, not having bid on a specific contract, cannot achieve standing under the *Scanwell* rationale.[9]

The zone of interest test focuses upon the proper relationship between the legislative and judicial branches of government, serving the purpose of "allowing courts to define those instances where it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of a legislative branch in a particular subject area." *Control Data*, 655 F.2d at 297 (D.C.Cir. 1981), quoting *Tax Analysts and Advocates v.*

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[9] "Disappointed bidder" cases following *Scanwell* include *Hayes International Corporation v. McLucas*, 509 R.2d 247 (5th Cir. 1975); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260 (5th Cir. 1978); *Union Carbide v. Train*, 73 F.R.D. 620 (S.D.N.Y. 1977); *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir.), *cert. denied*, 414 U.S. 911, 94 S.Ct. 233, 38 L.Ed.2d 149 (1973) ("the statute protects not only the Government's interest in securing advantageous contracts, but also the interest of those responding to the Government's invitation to do business with it." Id. at 1242); *Goldhaber v. Foley*, 519 F.Supp. 466, 480 (E.D.Pa. 1981); *Collins & Co. v. Clayton*, 476 F.Supp. 407 (N.D.Ga. 1979).

See also *J.H. Rutter Rex Manufacturing Co., Inc. v. U.S.A., et al.*, Civil Action No. 77-3018 (E.D.La. March 6, 1978).

Cf. PRI Price Supports v. Tennessee Valley Authority, 494 F.Supp. 974 (N.D.Miss. 1980) (APA not sufficient basis for standing where plaintiff's bid was non-responsive.)

Blumenthal, 566 F.2d 130, 140, (D.C.Cir.), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). To apply the zone of interest test, this court must examine the language of the relevant statutes, regulations, and legislative history to discern whether Rutter Rex's interest arguably falls within the zone Congress intended to be protected or regulated. *Control Data*, 655 F.2d at 293. "Slight" beneficial indicia will be sufficient to sustain a party's assertion of standing. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1189 (D.C.Cir. 1972); Control Data, 655 F.2d at 295.

While small business bidders clearly fall within the zone of protected interests of the Small Business Act and the Armed Forces Procurement Act, *Ray Baillie*, 477 F.2d at 701; *Kinnett Dairies*, 580 F.2d at 1265-66, the status of a large bidder under these statutes is not settled. Plaintiff argues that its near-preclusion[10] from bidding on government contracts contravenes the express interest of the Small Business Act in promoting competition in the American economic system. Plaintiff's interest in its own economic well-being might be said to be arguably within the zone sought to be protected by the Small Business Act if the Act is read broadly to promote small business not only for the benefit of small business, but also for the well-being of the nation.[11] Recognizing that analysis of the

[10] The court does not hereby rule on plaintiff's claim that it should be considered as a "frustrated" bidder, completely precluded from bidding for any contracts, since plaintiff's lack of opportunity to bid is contested by the defendants. It is significant, however, that the frustrated bidder in *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C.Cir. 1970), was found to be an intended beneficiary of the statute in question.

[11] "The purposes of the Act would not be achieved, however, if the aid to small business consisted of a structure which undermined the vitality of other businesses within the industry. Inherent in such action are the seeds of destruction of the same free system the Act is intended

question of standing requires the court to look at the party's status and not at the merits of the case, and noting the availability of the summary judgment proceeding under Rule 56 of the Federal Rules of Civil Procedure to weed out frivolous lawsuits, I read the language of the Small Business Act, 15 U.S.C. § 631(a), to encompass plaintiff's interest in economic viability within the parameters of the zone of interests to be protected by the Act. Rutter Rex thus meets the second prong of the standing test.

C. No Statutory Prohibition

The third part of the test is also met. None of the relevant statutes expressly prohibits judicial review of agency action, and the court "cannot infer a congressional intent to preclude judicial review of agency actions which are alleged to have subverted a clearly stated declaration of policy." *Cincinnati Electronics Corporation v. Kleppe*, 509 F.2d 1080, 1086 (6th Cir. 1975). Plaintiff alleges that DOD actions and regulations undermine the arguably clear policy of the Small Business Act and the Armed Forces Procurement Act to enhance competition, and so gains standing to contest their validity.

III. DISCUSSION

A. Constitutional Claim

Because of plaintiff's long-standing relationship with the government as a supplier of military garments, plaintiff claims that the small business program, by greatly

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(Footnote 11 continued)
to protect." *Duke City Lumber Co. v. Butz*, 382 F.Supp. 362 (D.D.C. 1974), *aff'd in relevant part*, 539 F.2d 220 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 737, 50 L.Ed.2d 751 (1977).

reducing the number of contracts on which it is able to bid, operates to deprive it of a property interest without due process of law in violation of the due process clause of the Fifth Amendment. However, it has long been recognized that the government, like private individuals and businesses, has the power "to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins*, 310 U.S. at 127. In exercising this power, of course, the government remains subject to the constitutional requirement of due process. I cannot accept the plaintiff's argument that the Department of Defense Small Business Program is unconstitutional because the plaintiff is disadvantaged competitively. "There is no constitutional duty to offer government procurement contracts for competitive bidding." *Ray Baillie*, 477 F.2d at 709; *Crown Zellerbach Corp. v. Marshall*, 441 F.Supp. 1110 (E.D.La. 1977) (denying preliminary injunction requiring government to contract with firms not meeting standard for affirmative action plan). The DOD has chosen to encourage small business participation in procurement contracts through the award of a "fair proportion" of contracts, drawing up industry classifications as it sees fit. No breach of its own procedures has been alleged. "In the area of socio-economic legislation, the government's action must be upheld if it is rationally related to a proper government purpose." *Ray Baillie*, 477 F.2d at 709, citing *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Certainly the small business program passes constitutional muster. Plaintiff's claims of due process violation are without merit.

B. Statutory Claim

Plaintiff additionally requests declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 702-706, on the grounds that the DOD small business

set-aside regulations contained in Part 7 of 32 C.F.R. are arbitrary and capricious and in excess of statutory authority. Although the challenge to the validity of the regulations may be decided solely by reference to the regulations and their statutory authority, the wellspring of plaintiff's dissatisfaction with the small business program is best appreciated by examining the undisputed facts.

The clothing manufacturing industry involves considerable participation by small business concerns, while many other industries from which the government must procure its equipment and supplies do not. As a result of the differences among industries, varying proportions of contracts are set aside for small business in each industry. DOD small business set-asides in 1980 were 7.2% of total awards, but in the contract categories for which plaintiff would have liked to have bid, over 90% of the contracts were set aside for plaintiff's smaller competitors. Plaintiff claims to have been effectively excluded from the bidding process. The regulations exceed statutory authority, plaintiff claims, because they fail to place a ceiling on set-asides at some point below 100%, reserving to large business the opportunity to compete for contracts in every industry, as mandated by the "full and free competition" provisions of the relevant statutes, the Small Business Act and the Armed Forces Procurement Act.

The Fifth Circuit rejected a similar challenge to a program to award federal subcontracts to socially or economically disadvantaged small businesses in *Ray Baillie*. The court's reluctance to encroach upon agency discretion is instructive:

> The complex and volatile nature of problems, including allocation of government procurement

contracts, often causes Congress to cast its statutory provisions in general terms, leaving to the agency the task of spelling out the specific regulations and programs. In this manner, agency expertise may be fully employed in dealing with such problems. The agency may evaluate the competing alternatives and formulate the policy best suited to the attainment of the statutory goal. Furthermore, the agency is left free to respond to the demands of changing circumstances or conditions unanticipated by Congress. Indeed, an agency could easily be prevented from serving its intended purpose if burdened with specific statutory regulations and programs.

So it is with the case at bar. Congress has declared that the actual and potential capacity of small business concerns must be developed and that a fair proportion of total purchases and contracts of the federal government must be placed with such firms. 15 U.S.C. §631. It has given the SBA the statutory authority and necessary discretion in awarding subcontractors to accomplish that goal. The discretion as to which firms shall receive subcontracts and the decision as to what regulations shall govern procurement is left to the SBA. 15 U.S.C. §637. It is not the duty of the courts to evaluate the arguments regarding allocation of government procurement contracts or to consider the wisdom of the present programs.[12]

More recently, in *Kinnett Dairies*, the court addressed the DOD small business set-aside program:

The government's interpretation of the procurement regulation is fully consistent with the

[12] 477 F.2d 696, 703-4 (5th Cir. 1973).

> statutory requirements of the Small Business Act and the Armed Forces Procurement Act. These controlling statutes simply require that a "fair proportion" of government purchases and contracts be placed with small businesses. Congress left it to the agencies to implement the policy through regulations and practices of their own construction.[13]

Furthermore, congressional review of the issues plaintiff raises in this action, together with congressional failure to modify longstanding agency practice, mandate that the administrative construction of the statutes be followed by this court "unless there are compelling indications that it is wrong." *Florida v. Mathews*, 526 F.2d 319, 324 (5th Cir. 1976). *See also Red Lion Broadcasting Co. v. FCA*, 395 U.S. 367, 381, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). Since the enactment of the "fair proportion" language in the Small Business Act and the Armed Forces Procurement Act, Congress has frequently reviewed defendants' implementation of the small business set-aside program.[14]

The court's task in searching for "compelling indications" that DOD interpretation of "fair proportion" is

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[13] 580 F.2d 1260, 1272 (5th Cir. 1978).

[14] *See, e.g.*, Congressional Hearings:

> Small Business Procurement Expansion and Simplification Act: Hearings Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business, 95th Cong., 2d Sess. (1978); DOD Procurement Policies and Practices: Hearing Before the Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business, 95th Cong., 2d Sess. (1978); Oversight Hearings on Small Business Administration Programs and Activities: Hearings Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business, 94th Cong., 2d Sess. (1976).

wrong is eased by the existence of a decision by the General Accounting Office on a protest by this plaintiff to a DLA small business set-aside. The Fifth Circuit explained in *Kinnett Dairies:*

> When actions of procurement officials have been expressly validated by considered decision of the GAO or are in compliance with a reasonably consistent pattern of GAO determinations, the courts should be extremely reluctant to overturn such actions.[15]

See also Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C.Cir. 1971); *M. Steinthal & Co. v. Seamans,* 455 F.2d 1289, 1305 (D.C.Cir. 1971).

Rutter Rex alleged in its protest in December, 1977, that DLA's set-aside program was not authorized by law, unfairly denied it the opportunity to compete, and precluded the government from obtaining a fair and reasonable price. The Comptroller General found:

> What Congress intended by the phrase "fair proportion," however, is not evident from either the statutory language itself or any legislative history....What is clear is that the broadly worded statutory language refers to the totality of Government procurement, *i.e.,* small business is to receive a fair proportion of the Government's total procurements. In other words, the fact that small business concerns may receive a significant portion of Government contracts in a particular industry does not necessarily mean that they are receiving more than a fair proportion of the

[15] 580 F.2d 1260, 1272 (5th Cir. 1978).

Government's total contracts. [cites omitted][16]

See also Fermont Division, Dynamics Corporation of America, Comp. Gen. B-195431, 13 (June 23, 1980). This court can discover no reason to reverse the conclusion of the Comptroller General's decision that "fair proportion" refers to the totality of government procurements.

This court further finds no basis for complying with plaintiff's request that agency small business set-asides be suspended pending definition of "fair proportion". Courts have repeatedly held that broad, undefined statutory terms grant complete discretion to the agency. See, e.g., *Perkins v. Bergland*, 608 F.2d 803, 805-806 (9th Cir. 1979); *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971).

C. Goal Practices

Plaintiff challenges not only the regulations discussed above, but also the internal DOD practice of setting goals for the department's set-asides and for total small business awards. Congress amended the Small Business Act in 1978 to encourage even greater efforts to increase small business participation:

> (g) The head of each Federal agency shall, after consultation with the [Small Business] Administration, establish goals for the participation by small business concerns ... in procurement contracts of such agency having values of $10,000 or more. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall

[16] J. H. Rutter Rex Manufacturing Co., Inc., Comp. Gen. B-190905 (July 11, 1978).

> realistically reflect the potential of small business concerns ... to perform such contracts ....

15 U.S.C. § 644(g).[17]

The goal for small business participation required by the Small Business Act applies to all awards to small business from set-asides, unrestricted bidding, or any other award procedure. The Department of Defense also sets a goal for small business set-asides alone. To implement the goals, the DOD sets a goal for the defense Logistics Agency ("DLA"), and DLA, in turn, sets goals for each of the six supply centers under its jurisdiction, including the DSPC. Until fiscal year 1981, DLA also assigned goals to each of DPSC's three directorates, "Clothing and Textiles", "Subsistance", and "Medical and Material", but now simply sets goals for the entire Center.

In past years, higher goals were set for the Clothing and Textile directorate of DPSC than for other directorates because the clothing manufacturing industry is one which involves considerable participation by small business concerns. Even within the Clothing and Textile directorate, few manufacturers for products in "textile" categories qualify for the set-aside program. As a result, to meet even a modest goal for set-asides in the Clothing and Textile directorate, or in DPSC, a high percentage of set-asides are made in the clothing industry, and specifically in the three contract categories in which plaintiff is prepared to bid.[18]

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[17] The Department of Defense added a provision to the Defense Acquisition Regulations in 1979 in compliance with the amendment: 32 C.F.R. § 1-705.6.

[18] Rutter Rex has in the past bid on and competed successfully for contracts to furnish items of sewing apparel to the defendants falling within Federal Stock Classifications 8405—"outerwear-men's"; 8410—outerwear-women's; and 8415—"clothing, special purpose".

The goals, claims plaintiff, are established on an annual basis in a completely arbitrary fashion, but nevertheless serve as minimum quotas. Without a firm definition of "fair proportion", the goal setting activity is arbitrary and capricious, it is argued.

Plaintiff's challenge to the goals practices of DOD and DLA which govern small business set-asides must fail. The goals do not determine which contracts will be set aside; the goals set are sometimes not attained. Their function is rather to gauge the effectiveness of the small business program. As internal management tools, they do not constitute final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. § 704.

IV. CONCLUSION

Although plaintiff has standing to invoke judicial review of the DOD interpretation of the Small Business Act and the Armed Forces Procurement Act, I find as a matter of law that the challenged regulations are consistent with DOD's statutory mandate. I further find that the challenged goal practices carried out by defendants are not final agency action amendable to review by this court.

Accordingly, summary judgment in favor of defendants and defendants-intervenor is granted and plaintiff's motion for summary judgment is denied.

UNITED STATES DISTRICT JUDGE

New Orleans, La.
February 19th, 1982.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-3239

D. C. Docket No. CA-80-2865-"E"

J. H. RUTTER REX MANUFACTURING CO., INC.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before TUTTLE,* POLITZ and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

---

* Circuit Judge of the Eleventh Circuit, sitting by designation.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

JUNE 9, 1983

Issued as Mandate: July 5, 1983

APPENDIX "D"

CONSTITUTIONAL PROVISION INVOLVED

Amendment V to the United States Constitution states, in pertinent part:

> "No person shall be...deprived of life, liberty, or property, without due process of law..."

PRINCIPAL STATUTORY PROVISIONS INVOLVED

The Armed Forces Procurement Act, passed in 1947 to govern specifically military procurement declares:

> "It is the policy of Congress that a fair proportion of the purchases and contracts under this chapter be placed with small business concerns." [10 U.S.C. §2301-1976] (re-enacted, Pub. L. 97-86, 10 U.S.C. §2301(b)-1981)****

> "Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned. ...." [10 U.S.C. §2305 (a)]

The Small Business Act provides in part:

> "(a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured.

The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation." [15 U.S.C. §631(a)]****

"(a) To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with

respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator. [15 U.S.C. §644(a)]

REGULATIONS INVOLVED

The general legislative intent expressed in the Armed Forces procurement Act and in the Small Business Act is carried over into DAR which contains the following, in pertinent part (July 27, 1979):

> "It is the policy of the Department of Defense to place a fair proportion of its total purchases and contracts for supplies, research and development, and services (including contracts for maintenance, repairs, and construction) with small business concerns." [32 C.F.R. §1-702(a)]****

> "Small business concerns, both established and potential suppliers (1-701.3 and 1-701.4), shall be afforded an equitable opportunity to compete for all contracts that they can perform." [32 C.F.R. §1-702(b)]

However, DAR contains the following additional regulations, each of which, as written and as applied, is specifically challenged in this action. The net effect of these regulations is the accomplishment, by exceeding Congressional intent, of a mandate to contracting officers

employed by the defendants to set aside 100% of the defendants' clothing procurement contracts for exclusive participation by small business concerns. These regulations are:

> "Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall be acquired on the basis of a repetitive set-aside. This procedure will be followed unless the contracting officer determines that there is not a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices. Withdrawal of a repetitive set-aside will be in accordance with 1-706.3." [32 C.F.R. §1.706.1(f)]****
>
> "None of the following is, in itself, sufficient cause for not making a set-aside:
>
> (i) a large percentage of previous acquisitions of the item has been placed with small business concerns;****
>
> (vi) small business concerns are considered to be receiving a fair proportion of total contracts for supplies or services;" [32 C.F.R. §1-706.1(j)****
>
> "Subject to the order of precedence established in 1-706.1(a), the entire amount of an individual acquisition or class of acquisitions, including contracts for architectural and engineering services, research, development, test and evaluation, maintenance repair and construction, except as provided in (4) below, shall be set aside for

exclusive small business participation (see 1-701.1) if the contracting officer determines that there is reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices (see 1-706.3)(a)). Total set-asides shall not be made unless such a reasonable expectation exists. (But see 1-706.6 as to partial set-asides.) Although past acquisition history of the item or similar items is always important, it is not the only factor which should be considered in determining whether a reasonable expectation exists. In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small business the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules." [32 C.F.R. §1-706.5(a)(1)]****

"Contracts for total small business set-asides may be entered into by conventional negotiation or by a special method of contracting known as 'Small Business Restricted Advertising.' The latter method shall be used wherever possible (see also 3-201.3). Where multiyear contracting procedures are appropriate (see 1-322), total set-asides may be made in connection therewith. Solicitations shall be restricted to small business concerns. Small Business Restricted Advertising, including awards thereunder, shall be conducted in the same way as prescribed for formal advertising in Section II, except that bids and awards will be restricted to small business concerns. Bids received from firms that do not qualify as small business concerns shall be considered as nonresponsive and shall be rejected." [32 C.F.R. §1-706.5(b)]

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No. 83-400

In the Supreme Court of the United States

OCTOBER TERM, 1983

J.H. RUTTER REX MANUFACTURING CO., INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that its past performance of Department of Defense contracts to manufacture apparel affords it a permanent, constitutionally protected, "entitlement to future opportunities to bid on such contracts" (Pet. 12) without regard to Defense Department regulations, authorized by statute, that "set aside" certain government contracts for bidding by small business concerns.

1. Most government procurement contracts are awarded on the basis of competitive bidding open to interested parties without regard to the economic size of the bidder. In 1948, however, Congress enacted the Armed Services Procurement Act, 10 U.S.C. 2301 *et seq.*, which states "the policy of Congress that a fair proportion of the purchases

and contracts under this chapter be placed with small business concerns." 10 U.S.C. 2301(b).[1] To implement the "fair proportion" requirement, in 1958, the Secretary of Defense promulgated the Defense Acquisition Regulations, 32 C.F.R. 1-700 *et seq.*[2] The Secretary's regulations embody a variety of strategies for increasing small business participation in government procurement.[3] At issue here are provisions directing that certain government contracts be "set aside for the exclusive participation of small business concerns" (32 C.F.R. 1-706.1(b)). The regulations mandating these "set-asides" provide (32 C.F.R. 1-706.5(a)(1)):

> [T]he entire amount of an individual acquisition or class of acquisitions * * * shall be set aside for exclusive small business participation (1-701.1) if the contracting officer determines that there is a reasonable

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[1]The purpose of this policy was to insure that the small businesses that had developed to meet the nation's needs during the Second World War would not disappear in the absence of the demand created by full mobilization, undermining national preparedness:

> The [Armed Services Procurement Act] will aid in the development of a larger number of known and capable suppliers geographically spread over the entire country, thus affording added production security in the event of any emergency and assist in establishing insurance against acute production bottlenecks.

S. Rep. 571, 80th Cong., 1st Sess. 6 (1947). Congress extended the "fair proportion" policy to government contracts generally in the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252(b), and the Small Business Act of 1958, 15 U.S.C. 631(a) and 644(a).

[2]The Defense Acquisition Regulations were formerly known as the Armed Services Procurement Regulations.

[3]These strategies include publicizing of contracting methods and practices, dividing acquisitions into lots smaller than the government's total requirements, and maintaining liaison with other federal, state and local agencies to channel information and assistance to small businesses. 32 C.F.R. 1-702(b).

> expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices (1-706.3(a)).

In 1979, the set-aside procedure was simplified to some extent. The regulations were amended to provide that where bidding on a particular item had been set aside for small businesses in the past, it would continue to be set aside in the future as long as the required conditions of competition and price are met. 32 C.F.R. 1-706.1(f).[4]

2. Petitioner is a business concern, engaged in the manufacture of apparel, that employs more than 1500 people and is accordingly not eligible to bid on contracts for clothing that have been set aside for small business participation (Pet. App. A3). Petitioner alleges that it has manufactured apparel procured by the Department of Defense for 40 years, and that one of its plants has been "almost exclusively" devoted to production of apparel produced for the Department of Defense (Pet. 3), but that because of the government's small business preference program, it is no longer certain to be able to bid on a significant number of apparel procurement contracts.[5]

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[4]The cited regulation provides in pertinent part:

> Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service * * * shall be acquired on the basis of a repetitive set-aside. This procedure will be followed unless the contracting officer determines that there is not a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices.

[5]Petitioner does not deny that it continues to have opportunities to bid on some Department of Defense procurement contracts for apparel (Pet. 5 n.1).

Petitioner brought this action in the United States District Court for the Eastern District of Louisiana alleging, as it does in this Court, that this "extended business relationship" affords it "a legitimate claim of entitlement to future opportunities to bid on" Defense Department procurement contracts for military apparel (Pet. 12), and that the Department of Defense's 1979 "repetitive set-aside regulations completely and permanently foreclose [its] future opportunity to bid on procurement contracts for products that it supplied to the DOD for over forty years" (Pet. 18). Petitioner argued that the regulations effect a deprivation of "its property entitlement without due process" (Pet. 17-18).[6]

Both the district court (Pet. App. A36-A37) and the court of appeals (*id.* at A21-A23) rejected petitioner's constitutional contention on the ground that petitioner had failed to demonstrate anything more than a unilateral expectation that it would be able in the future to continue to bid on a satisfactory number of procurement contracts.

3. The courts below correctly rejected petitioner's contention. As petitioner recognizes (Pet. 7-8, 10), *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), sets forth the conditions that must be met to establish an entitlement or property interest entitled to due process protection:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. * * *

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[6]In addition to its constitutional claim, petitioner unsuccessfully argued below that the challenged procurement regulations exceed the statutory authority of the Secretary of Defense. Petitioner has abandoned that claim in this Court (Pet. 7).

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Petitioner thus must be able to identify some basis that rises above unilateral expectation to support his claim of entitlement to bid on government contracts without regard to the Department of Defense's small business set-aside regulations. Petitioner appears to contend (Pet. 12) that this source is the Department of Defense regulations as they existed prior to certain changes effected in 1979, and the mere fact that petitioner has in the past been eligible to bid on a broader range of Department of Defense procurement contracts.[7]

Petitioner's contention is insubstantial. The implication of petitioner's argument is that the government may never alter its procurement regulations and practices if the change would disadvantage someone who has bid on contracts in the past — even though the revised regulations are

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[7]The gist of petitioner's quarrel with the decision below is that the court of appeals failed explicitly to acknowledge that under some circumstances mutual understandings not traceable to any statute or regulation may support a claim of entitlement (Pet. 15-16). But as we explain in the text, petitioner's assertion that it had a right to continue to bid on procurement contracts without regard to Department of Defense small business set-aside regulations rests on nothing more than a highly unreasonable "subjective 'expectancy' " that is unprotected by the Due Process Clause. *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972).

authorized by statute.[8] We are unaware of any authority for such an astounding proposition, and petitioner cites none.[9] Similarly, the mere fact that petitioner previously was awarded contracts for the procurement of apparel does not reflect any mutual "understanding" that petitioner would be allowed to bid on contracts in the future. Procurement contracts are limited by their terms to the particular goods and services specified; absent some express provision to the contrary, such contracts do not purport to fix the relations of the parties for all time. Petitioner has not alleged that the procurement contracts it was awarded contained any such special provisions. Nor does it allege that anything in the regulations in effect prior to 1979 created a basis for any expectation that the regulations would not be altered.

4. Petitioner substantially exaggerates the differences between the procurement regulations in effect prior to 1979 and those currently in effect. A comparison of the earlier regulations with the present ones confirms that petitioner never had any "right" to bid on apparel contracts without

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[8]There is no claim here that petitioner was denied any opportunity to be heard respecting regulatory changes. Rather, petitioner's claim is that the government may not "abridge" his "right" to bid on every contract.

[9]As the court of appeals observed (Pet. App. A22 n.22):

> The cases cited by [petitioner] do not support its claim. The cases may be categorized as standing for one of the following holdings. First, that a person who contends that he or she was invalidly denied access to the government bidding process possess[es] standing to bring an action challenging such denial. *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961). Second, that a person may not be denied access to the government bidding process absent procedural regulations authorizing or governing such denial. *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). Finally, that when Congress delineates specific qualifications for potential bidders, a person may not be denied access to the bidding process if he or she meets those qualifications. *Schraier v. Hinkel*, 419 F.2d 663 (D.C. Cir. 1969).

regard to the statutory policy favoring small businesses. Beginning in 1958, whenever there was a reasonable expectation that bids on a proposed acquisition would be received from a "sufficient number of responsible small business concerns so that awards will be made at reasonable prices," the contract was set-aside for small businesses. See, *e.g.*, 32 C.F.R. 1.706-5(a) (1961). In 1979, the regulations were amended to trigger the set-aside procedure whenever it is expected that "at least two" responsible small business concerns will bid on a proposed acquisition and that the award can be made at reasonable prices. 32 C.F.R. 1-706.5(a)(1). Prior to 1979, the regulations required a case-by-case determination that the requisite number of responsible small business bidders existed to trigger the small business set-aside. As indicated above (page 3 & note 4, *supra*), the present regulation allows contracts for items that had been awarded to small businesses in the past to be set aside on subsequent occasions unless there is reason to believe that the requirements of numerosity of bidders and reasonableness of prices will not be met.[10] Certainly nothing in the pre-1979 regulations created any basis for petitioner to conclude that procedural changes such as these would not be effected from time to time, or that it would always be able to bid on apparel contracts without regard to the small business set-aside.

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[10] Petitioner's selective quotation of the pertinent regulation (Pet. 4-5) creates the impression that all contracts for items once set aside for small businesses are forever subject to the set-aside. In fact, the requirements of numerosity of bidders and reasonableness of prices remain effective. See page 3 & note 4, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11